constitutes the crime of treason—to the killing a man with malice prepense is the act which constitutes the crime of murder. The levying of war is a compound expression, which may be composed of many subordinate facts. It is the principal fact or result to which must be proved produced by the evidence before a court and jury can convict a man of a crime, as killing a man with malice prepense is the principal fact or result which must prove out to the evidence before a man can be convicted of murder. It was not in the head of 40,000, 10,000, 1000 or 100 men should assist an enemy, as Arnold, or Orleans, in defiance of the authority of the U. S. all men would consider it a levying of war—in a case in point this latter would be but one opinion. But if only two or three men were to assemble against, with intent forcibly to overturn the government of the United States. I presume no man would call this a levying of war—the idea would be ridiculed by the whole nation. The great difficulty is in fixing the point of partition between those acts which amount to levying war and those which do not. Where assemblies of men of different species are often separated by such delicate shades as to render it difficult to distinguish the one from the other, some slight difference is discernable between the opinions of different judges as to the precise point at which it draws the line of distinction between murder and manslaughter, and in the 4th section of the Constitution of Virginia, a variety of cases which happen, a difference of opinion frequently occurs, between the court and the jury—the judges—either human wisdom or human language is competent to define with such certainty, as to leave no room for a difference of opinion, between the court and jury, which will constitute the principal fact, or result, to be proved, or to draw with precision the line of demarkation between the powers of the federal and the powers of the state governments yet have we been difficulty should ever arise, in the minds of many acts which all agree we have power to do, and there are many others which all agree we are not authorized to do—but questions frequently occur about which there is great difference of opinion, and which must be settled by the good sense of those who have to decide them, and which have been established for the security of liberty. It was expected by the framers of our constitution, that we should never have to exercise the protection of jurisdiction, which is conferred upon the judiciary—but it is rather that this one innocent man should suffer. Should we, because some partial liconvenience has been occasioned, or prostrate the sacred barriers fixed by the constitution?—No sir. This idea should not be fixed in the minds of human happiness, will reconcile himself to them as the lesser evil.

It is a most profitable question to the bench, that it violates that political axiom in the science of free government, that the legislative, judicial and executive departments ought to be separate and distinct. It has been hitherto thought wise to vest the power of interpreting law from the legislative and executive powers. This seems to be a principle of all governments of the union as well as the constitution under which we are assembled. It has been thought by all the greatest statesmen who have figured on this American theatre, and especially those who have formed the attachment in liberty, have professed a sacred respect. It has another consideration, whether the first section of this bill, which seems to contain a recognition of the judiciary, can be in its nature a legislative, judicial act, if Congress, every instance of a bridge, bill, and explanatory section, be within its power to alter or will not deny, but I consider that Congress that Congress power to expound the constitution or any law which they cannot repeal, to govern any other department of the government. Can Congress give a construction a treaty to make law for our judicial courts? Surely such a power was never contended for. By the compact between Virginia and Kentucky when the latter became an independent state, it was stipulated that all disputes had derived from the state of Virginia, should be decided by the laws of that state then in force. Great uncertainty and doubt was attached to the interpretation of that law in the course of Kentucky. But I presume it would hardly be contended that the legislature of Kentucky could remedy the evil by a legislative explanation of that law, because it was made a law over which it has no control. The executive and judiciary derive their powers and authority from the constitution and partly from the acts of Congress. Can it be pretended that Congress has power by a legislative interpretation to direct or control either the executive or judiciary in the exercise of powers derived from the constitution? Certainly not. Each department within its own sphere of duty is the great judge of the constitution for itself.

The people have by the constitution, distributed the powers of the law of treason by vesting it, giving to Congress power to add the punishment, but they have left the establishment these combined constitute the law of treason, by which every citizen of the union is to be tried, interpreted and application of which between not to Congress, but to courts and juries. In the 3rd and 4th sections of the bill we are not only assuming the exercise of judicial power, we are actually taking the rights of juries. Before any man can be convicted of treason he must be tried by a jury of his peers, and of the act of levying war, and whether levying war is considered a fact, or compound fact of law and fact, equally the province of the jury to decide it, whatever may be the opinion of the judge. Would we be attempting to do by this bill? Why, sir, we are undertaking to specify the acts which amount to the fact of levying war, or rather declaring what evidence shall be sufficient to convict a man of the crime. A very strange opinion has been advanced by an honorable member of the committee, Mr. Adams, of Massachusetts (Mr. Adams.) He contends that we have a right to give our opinion or instruct the jury of the defence of the constitution, but that courts and juries will not be bound by it, if they should think differently. If this bill, when passed, will not be obligatory, it proves that we have no power to pass it. The constitution declares that the constitution itself and all laws passed in pursuance thereof shall be the supreme law of the land. According to the opinion of the gentleman from Massachusetts, we might have judicial construction, legislative construction and executive construction conflicting with each other. This would be a state of confusion and confusion which could never have been intended by the wise framers of our happy constitution.

The honorable chairman has, however, controverted this right of the courts to disregard our explanation. I am not disposed on the present occasion to discuss at large the question whether the judicial courts can disregard an act of the legislature which they may deem unconstitutional. I am not disposed to deny the power of the judiciary, to declare an act of Congress unconstitutional, in the limits in which it has been usually generally stated. I presume that it cannot be pretended that the judges are to be subject to be reversed by a board of censors and *we were made* by a written declaration to notify an act of the legislature, and to a question of which they have cognizance to brought before them for adjudication, in a course of legal proceeding, involving the life, liberty, or property of an individual or individuals, in direct opposition to the law, and to disregard the constitution or an act of Congress. They must give effect to the constitution, which is the supreme law, bowing immediately from the hands of God, to the people, rather than to the act of an inferior agent. Every department within its sphere must judge for itself of the constitution and obey it as supreme law. The exercise of this negative power by the courts results from general principles of law, and is sanctioned by the constitution. A court of justice ought to decide every case according to law, and when that rights dedicated in an act of Congress or the constitution. I believe it was generally admitted and when the constitution was adopted, that the judiciary would when necessary and proper exercise this negative power.

The different departments were expected to check and restrain each other. In some instances they have in some instances violated the constitution, however, perceive the evil, and have corrected the evil present. If we believe the constitution authorizes the judiciary we ought to presume judges will entertain the same opinion. The legislature should not, without apparent necessity, bring itself into collision with any other department of the government. A state of hostility between the different departments is very much to be deplored. I consider this instability with regard to fundamental principles extremely unfortunate, and I consider the happiness of every government to the permanency of every government to depend in great measure on the constitution or habit. Great leading principles when once established and unbroken serve as landmarks to direct those entrusted with the administration of the government, and to warn the people where their important rights are assailed.

One observation has been made in favor of this bill, that it will remove the entirely destitute of solidity. We are told that it is necessary to amend the constitution because it is difficult to understand it. I presume no amendment or explanation is necessary for the judiciary of the constitution. By the law of treason, as it now exists, every man is punishable who levies war against the U. S. in every manner it may be done; but if we specify the particular acts and circumstances and high treason, which the crime, we thereby enable the villain with more certainty to defy punishment.

There is one consideration which ought to impress itself on the mind of every member of this House. If we assume the power of specifying what acts shall amount to a levying of war, we assume a power which we have not the same power; and hence it will follow that treason instead of being fixed and invariable by law and constitution, will always depend on the arbitrary opinion of the party that happens to be in power. Would we be guilty of this barrier of the constitution must not be broken down. This once passed and we are adrift on a boundless ocean without any thing to guide or restrain us, but our own will, when and capricious.

(To be continued.)

WASHINGTON CITY.

FRIDAY, MARCH 18.

CASE OF JOHN SMITH.

SENATE—MARCH 15, 1808.

The following is the letter of Mr. Smith, read by Mr. Harper, and addressed to Mr. Gallatin and others.

(DUPLICATE.)

Gravesant, Feb. 19, 1808.

Gentlemen,

After the Senate had resolved to hear my testimony on the first of April, I made every effort to avoid delay, the best arrangement in my power to collect it. Being fully convinced that my testimony would be complete without the testimony of witnesses in the states of Connecticut, New York, Kentucky and Ohio, and in the territories of Orleans and Mississippi, and it being physically impossible for me to obtain the time allowed by the resolution to attend in person at each of those places, I wrote to Richmond, where I was expatriated, and on whose friendship and exertions I thought a man could be so generously confided to procure the testimony required from five respective neighbourhoods, and to forward it to Washington prior to the seat of government. At the same time it was necessary for me to be present at Richmond to act as counsel for myself and *we were made* by a written declaration to notify an act of the legislature, and to a question of which they have cognizance to brought before them for adjudication, in a course of legal proceeding, involving the life, liberty, or property of an individual or individuals, in direct opposition to the law, and to disregard the constitution or an act of Congress. They must give effect to the constitution, which is the supreme law, bowing immediately from the hands of God, to the people, rather than to the act of an inferior agent. Every department within its sphere must judge for itself of the constitution and obey it as supreme law. The exercise of this negative power by the courts results from general principles of law, and is sanctioned by the constitution. A court of justice ought to decide every case according to law, and when that rights dedicated in an act of Congress or the constitution. I believe it was generally admitted when the constitution was adopted, that the judiciary would when necessary and proper exercise this negative power.

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